U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 October 2005

Case No: **2005-INA-00075**
ETA No.: P2003-DC-03404443

In the Matter of:

POTOMAC CAFE, INC.,
Employer,

on behalf of

KEUN HYO LEE,
Alien.

Certifying Officer: Stephan w. Stefanko

Appearances: John D. Shin, Esquire
For the Employer

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Potomac Cafe, Inc. (Employer) filed an application for labor certification on April 26, 2001, on behalf of the above-named Alien pursuant to section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (the Act).[1] The U.S. Department of

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

Labor Certifying Officer (CO) denied the labor certification application. The Employer requests review of this denial of the labor certification application pursuant to 20 C.F.R. § 656.26.

STATEMENT OF THE CASE

On March 31, 2004, the CO issued a Notice of Findings (NOF) proposing to deny labor certification because the Employer's job requirements were unduly restrictive. (AF 66-68). In its application, the Employer listed the occupational title as "Cook, Specialty, Foreign Food," D.O.T. 313.361-030. (AF 76). In the NOF, the CO stated that based on a review of the menu, the Dictionary of Occupational Titles (DOT) occupational title should not be Cook, Specialty, Foreign Food 313.361-030 (SVP 7 – 2 to 4 years), but Sandwich Maker 317.644.010 (SVP – short demonstration up to and including one month) or a combination of Sandwich Maker and Cook, Short Order – 313.374.014 (SVP - 30 days up to three to six months of combined education, training and experience). Thus, according to the CO, the requirement for two years of experience exceeded the DOT standard and was unduly restrictive. (AF 66-68).

In the NOF, the CO noted that the Employer's business establishment appeared to be primarily a sandwich and breakfast shop, with foods listed that do not require extensive training in cooking in order to prepare and cook, and which preparation did not correspond with the job duties of a Cook, Specialty, Foreign Food, which is a highly skilled occupation. The Employer was advised that it could rebut the CO's finding by submitting evidence that the requirement arises from business necessity. The Employer was further advised that in proving business necessity, it must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the by the employer. It was noted that the rebuttal evidence must include documentation which clearly shows that the position requires the services of a "full fledged cook" as defined in the DOT. In the alternative, the Employer was also advised that it could amend the application for Alien Employment Certification to the DOT standard. The Employer was notified that it had until May 5, 2004 to rebut the findings or remedy the defects outlined in the attachment. (AF 66-68).

The Employer filed a rebuttal dated May 4, 2004. (AF 62-65). In the rebuttal, the Employer's attorney asserted that the Employer's business establishment is primarily an international buffet restaurant instead of a sandwich and breakfast shop. The Employer's attorney noted that the employer served American, Italian, Chinese and Japanese cuisine. The Employer's attorney further asserted that the cook in the restaurant does prepare soups, salad, and noodles, and does bake, roast, broil and steam meats, fish, poultry and vegetables. The Employer's attorney concluded that the duties he outlined are encompassed in the 313.361-026 Cook, Specialty, Foreign Food description. (AF 62-65). The Employer's attorney appended the Employer's menu to his rebuttal, which had previously been submitted at the time of application. (AF 64-65, 74-75).

The CO issued a final determination denying certification on June 25, 2004. (AF 60-61). The CO noted in the final determination that the rebuttal submitted was not accepted. The copy of the Employer's menu submitted with the rebuttal was identical to the menu in the case file at the time of application. The CO concluded that the menu clearly establishes the business as a breakfast/sandwich shop. The CO noted that the menu lists Italian and Chinese/Japanese as being part of the N.Y. style lunch buffet, which includes a Su Shi [sic] buffet, but provides no description of any of these food items. The menu, however, includes a detailed list of 41 salads, sandwiches and specialty sandwiches, which the CO noted clearly documented that the Employer was primarily a sandwich shop. The CO concluded that the preparation of the food items listed on the menu does not correspond with the job duties of a Cook, Specialty, Foreign Food. The menu submitted also did not support the Employer's claim that the cook prepares soups such as minestrone and clam chowder, salads such as garden salad and Greek salad, noodles such as chow mein, lo mein and lasagna, or bakes, roasts, broils and steams meats, fish, poultry and vegetables. The menu, standing alone, did not even suggest the kinds of cooking that require extensive experience in order to successfully perform the job, according to the CO. (AF 60-61).

In the final determination, the CO noted that all rebuttal evidence was submitted as a correspondence from the Employer's attorney, and further noted that assertions by an employer's attorney that are not supported by underlying statements by a person with knowledge of the facts

do not constitute evidence. (AF61). The CO rejected the application, and noted that the application has been correctly reclassified and that the experience requirement exceeds the DOT.

The Employer's attorney submitted a "Request for Review of a Denial of Certification" to the CO on July 29, 2004, and included a business owner's "Statement Regarding Nature of Business Activity and Business Necessity for Ethnic Cook," Pictures labeled exterior, interior, interior (sushi bar), and interior hot food bar of Potomac Cafe, Inc., a document of partial food items with a description, and the 2003 U.S. Income Tax Return for an S Corporation. (AF 34-57). This "Request for Review of a Denial of Certification" was construed by the CO as a Request for Reconsideration of the denial of the Application for Alien Employment Certification. The CO stated that motions for reconsideration will be entertained only with respect to issues which could not have been addressed in the rebuttal. Because the motion did not raise such an issue, the CO denied it on August 10, 2004.

On September 9, 2004, the Employer's Attorney submitted a Request for Reconsideration addressed to the Chief Administrative Law Judge, Department of Labor, challenging the CO's denial of certification. (AF 1 -31). The "Request for Reconsideration" is construed as a request for review of the denial to the Board of Alien Labor Certification Appeals (Board), in accordance with 20 C.F.R. § 656.26. The Board docketed the case on December 13, 2004.

DISCUSSION

The principal issues presented in this case are (1) whether the attorney's assertions in the rebuttal can be considered as evidence; (2) whether the additional evidence submitted in the request for reconsideration filed after the Final Determination should be considered; and (3) whether the Employer's requirements for Cook, Specialty Foreign Food, were unduly restrictive job requirements in violation of 20 C.F.R. § 656.21(b)(2).

I. *Employer's attorney's assertions as evidence.*

In this matter, the Employer's attorney submitted a statement, appending the menu that had already been submitted with the application, as rebuttal evidence. (AF62-65). The attorney attempted to establish key elements that were considered deficient in the Employer's application by the CO, noting that the Employer's business is "primarily an **International Buffet** restaurant instead of a sandwich and breakfast shop." (Emphasis in original). The Employer's attorney further asserted that the cook prepares certain food items, listing specifics, and alleged that the Employer's Su Shi [sic] Buffet is very famous in the D.C. area.

Statements of counsel, in a brief or otherwise presented, that are unsupported do not constitute evidence, and are not entitled to evidentiary value. *Modular Container Systems, Inc.,* 1989-INA-228 (July 16, 1991) (*en banc*) In *Modular Container Systems, Inc.*, the Board noted that an attorney may be competent to testify about matters of which he or she has first-hand knowledge, but in this case, as in *Modular Container Systems, Inc.,* it cannot be ascertained whether the specific facts asserted by counsel were based on his first hand knowledge. And, as noted in *Modular Container Systems, Inc.,* the Employer's attorney would be facing an ethical dilemma when acting both as a witness and an advocate in the same administrative proceeding. The menu submitted by the attorney does not support the Employer's attorney's assertions in his correspondence. We conclude that those assertions do not constitute evidence, and are not entitled to evidentiary value.

II. *Evidence submitted along with the request for reconsideration*

After the Final Determination was issued, the Employer's attorney submitted its "Request for Review of a Denial of Certification" to the CO on July 29, 2004, and with the request, the Employer filed additional documents in support of its request for review. The CO concluded that the Request for Review submitted to the CO was, in effect, a motion for reconsideration, and noted that motions for reconsideration will be entertained only with respect to issues which could not have been addressed in the rebuttal. Since the motion does not raise such an issue, the CO denied it on August 10, 2004. The CO concluded that the additional documents submitted by the Employer did not constitute new evidence or changed circumstances, as they addressed the issues noted in the NOF, which should have been addressed in the Employer's rebuttal. Under the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last

chance to make its case. *Carlos Uy III*, 1997-INA-304 (March 3, 1999) (*en banc*). Thus, it is an employer's burden at that point to perfect a record that is sufficient to establish that certification should be issued. *Id.* The Employer failed to submit these documents in rebuttal, the last chance to makes its case regarding the issues noted in the NOF. The additional documents submitted with the Request for Review are not entitled to evidentiary value because the Board does not consider additional evidence submitted in conjunction with a request for review. *Import S.H.K. Enterprises, Inc*., 1988-INA-52 (Feb. 21, 1989) (*en banc*).

III. *Unduly Restrictive Requirements under 20 CFR 656.21(b)(2).*

The CO denied certification, citing violations of 20 C.F.R. § 656.219(b)(2), which requires that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:

> (i) The job opportunity's requirements, unless adequately documented as arising from business necessity:
> (A) Shall be those normally required for the job in the United States;
> (B) Shall be those defined for the job in the Dictionary of Occupational Titles (D.O.T.) including those for subclasses of job;
> (C) Shall not include requirements for a language other than English.

To establish business necessity under Section 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties described by the employer. *Information Industries, Inc*., 1988-INA-82 (February 9, 1989) (*en banc*).

The Employer claims that the job requirements bear a reasonable relationship to the occupation in the context of the Employer's business, and that all the duties are encompassed in the D.O.T. standard for Cook, Specialty, Foreign Food, 313.361-026. Based on the menu, however, which was the only written documentation submitted appropriately as evidence in this

application, the CO concluded that the job was a combination of Sandwich Maker and a Cook, Short order, and reclassified the DOT code and title based on the limited nature of the menu. The record contains no other evidence, beyond Employer's counsel's bare assertions, demonstrating that the two years of experience job requirement bears a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job duties described by the Employer. The very limited menu submitted as rebuttal evidence does not support classification of the position as a specialty cook under the DOT. Because the Employer has not established a business necessity for the unduly restrictive requirement, we find that Employer has not met its burden of proof. Therefore, the denial of certification must be affirmed. Accordingly,

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.